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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Bell Atlantic Corporation	)	**CC Docket No. 98-11**
For Relief From Barriers To Deployment	)	
Of Advanced Telecommunications Services	)	
	)	
Petition of U S West Communications, Inc.	)	**CC Docket No. 98-26**
For Relief from Barriers to Deployment	)	
Of Advanced Telecommunications Services	)	
	)	
Petition of Ameritech Corporation	)	**CC Docket No. 98-36**
To Remove Barriers to Investment in	)	
Advanced Telecommunications Capability	)	

COMMENTS OF EXCEL TELECOMMUNICATIONS, INC.

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April 6, 1998

SUMMARY

The Commission should not be fooled by the clever captioning of these Petitions. Although the Petitions are laden with descriptions of Internet architectures and xDSL technologies, the BOCs' Petitions are not about promoting deployment of advanced telecommunications services at all. Instead, the petitions are another example of the BOCs' intransigence in fulfilling their end of the 1996 Act's pro-compeitive initiatives. Rather than creating the conditions for a multi-provider competitive environment (which, ironically, would grant the BOCs much of what they claim to seek through these Petitions), the BOCs are seeking to rewrite the statute to grant them an exemption for a broad and ill-defined universe of "data" services. "We promise to deploy advanced technologies in our network," the Petitions say, "but only if we are freed from having to open our network to competition."

This is a bargain that the Commission cannot accept. Section 10 of the Act expressly forbids the Commission from granting the principal relief that the Petitions seek. Only after the BOCs fulfill their duties under Section 251(c) and satisfy the requirements of Section 271 may the Commission entertain petitions to forbear from applying portions of those provisions. Although the BOCs have attempted to avoid Section 10's prohibition by captioning their Petitions under Section 706, an uncodified provision of the 1996 Act is not a separate grant of authority to the FCC and cannot be used to sweep away the core provisions of the Act. Accordingly, the BOC Petitions should be denied as beyond the FCC's authority.

Even if the actions requested were not specifically prohibited by the statute, they are poor policy. The consequences of deregulating BOC "data services" would be devastating to competition in advanced telecommunications services. There is no principled way to maintain the distinction the Petitions advocate between "data" services and the POTS network they now

operate. As a result, grant of the requested relief would give the BOCs almost unlimited control to decide the extent to which they unbundle the network, and would shut most providers off from essential ILEC facilities needed to provide competing telecommunications services. For this reason also, the BOC Petitions should be denied.

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COMMENTS OF
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Excel Telecommunications, Inc. ("Excel"), by its attorneys, respectfully submits the following consolidated opposition to the above-referenced Petitions filed by Bell Atlantic Corporation, U S West Communications, Inc. and Ameritech Corporation (collectively, the "BOC Petitions").[1] Relying on Section 706(a) of the Telecommunications Act of 1996, the BOC Petitions request forbearance from Sections 251 and 271 of the Communications Act, as amended, and other actions, allegedly in order to remove "barriers to deployment of advanced telecommunications services." In an Order released March 16, 1998, the Commission

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[1] Petition of Bell Atlantic Corporation for Relief from Barriers to Deployment of Advanced Telecommunications Services (filed Jan. 26, 1998) (*Bell Atlantic Petition*); Petition of U S West Communications, Inc. for Relief from Barriers to Deployment of Advanced Telecommunications Services (filed Feb. 25, 1998) (*U S West Petition*); Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Capability (filed March 5, 1998) (*Ameritech Petition*).

consolidated the pleading cycles for these Petitions.[2] For the reasons explained below, these blatant attempts to reverse the 1996 Act's pro-competitive initiatives should be denied.

I. INTRODUCTION

Although laden with descriptions of technological advances and statistics on Internet growth, the BOCs' Petitions are not about promoting deployment of advanced telecommunications services at all. Rather, these petitions are another example of the BOCs' intransigence in fulfilling their end of the 1996 Act's competitive framework. Instead of creating the conditions for a multi-provider competitive environment (which would give them the interLATA authority they seek), the BOCs ask the FCC to excuse them from competition. They seek Commission approval to convert their monopoly network to an unregulated "advanced" data network, shedding both the interLATA restriction and their interconnection, unbundling and resale obligations in the process. "We promise to deploy advanced technologies in our network," the Petitions say, "but only if we are freed from having to open our network to competitors."

The FCC should not cave in to such threats. Indeed, it has no authority to grant the relief the Petitions seek, even if one overlooked the devastating effects such actions would have on competition. Section 251(c) requires incumbent LECs (including the BOCs) to interconnect at any technically feasible point with competing telecommunications carriers, to make the features, functions and capabilities of their networks available to others on an unbundled basis, and to permit resale of their own retail telecommunications services. Section 271 conditions BOC authority to provide in-region interLATA services on a demonstration that a BOC has fulfilled

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2 *Order,* DA 98-0513 (Chief, Policy and Program Planning Div., Comm. Car. Bur. March 16, 1998).

these duties completely, and upon satisfaction of other competitive criteria enumerated therein. To ensure the pro-competitive benefits of these sections are realized, Congress expressly forbade the FCC from exercising its new forbearance authority to forbear from the requirements of these sections, until *after* they have been fulfilled. Thus, the specific relief requested in the Petitions is forbidden by Section 10(d) of the Act, 47 U.S.C. § 160(d). Moreover, the BOCs' interpretation of Section 706's reference to forbearance as an independent grant of authority would negate the whole purpose of Section 10 and lead to other absurd results. Accordingly, the Commission should deny the Petitions as contrary to its authority.

Not only is the requested relief beyond the Commission's authority, the results of granting such relief would be devastating to competition in telecommunications services. There is no principled way to maintain the distinction between "data" services and the POTS network now deployed by the BOCs. As a result, grant of the relief requested will give the BOCs almost unlimited control to decide the extent to which they unbundle the network, and will shut most providers out of the local and advanced telecommunications markets.

For these reasons, the BOCs' Petitions should be denied.

II. THE COMMUNICATIONS ACT EXPRESSLY FORBIDS THE RELIEF THAT THE BOC PETITIONS SEEK

The central premise of the BOC Petitions is that if only they were freed from the meddlesome obligations of Sections 251(c) and 271, the BOCs would deploy all sorts of advanced technologies in their networks. Put simply, as a quid pro quo for their response to marketplace demand, the BOCs insist that the Commission insulate them from the pro-competitive components of the Act and open a back door to Section 271 interLATA authorization. However, the Petitioners fail to overcome the clear statutory language that

precludes the FCC from doing so.

Section 251(c) requires an incumbent LEC to interconnect with competing providers of telephone exchange service at any technically feasible point in the network, to provide telecommunications carriers with unbundled access to network elements, and to offer at wholesale rates its retail telecommunications services to other carriers for resale. 47 U.S.C. §§ 251(c)(2-4). These obligations extend to interconnection, network elements and retail services for the purpose of providing services that the Petitions broadly classify as "data" or "packet-switched" services. Moreover, Section 271 establishes the standards for approval for a BOC to provide in-region interLATA services, a term that includes "data" services originating within the BOC's home region. 47 U.S.C. § 271(b)(1). None of the BOC Petitioners have yet satisfied these standards.

In the Telecommunications Act of 1996, Congress also gave the FCC – for the first time – authority in Section 10 of the Act to forbear from applying provisions of the Communications Act, if the Commission finds that certain standards are met. 47 U.S.C. § 160(a). At the same time, Congress carefully circumscribed this newly-created authority. Section 10(d) provides:

> Except as provided in Section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

This provision clearly and unequivocally precludes the Commission from granting the relief sought in the Petitions.

Of course, the BOCs do not make an attempt to justify forbearance under Section 10. Instead, they contend that Section 10 – and Section 10(d) – are irrelevant because in an uncodified portion of the 1996 Act, Congress granted the FCC *additional* and unlimited

forbearance authority.[3] In the name of promoting "advanced telecommunications services," the BOCs argue, the FCC can do almost anything, including undercut the core provisions of the Act. But Section 706 cannot bear near the weight the BOCs place on it.

The BOCs' interpretation of section 706 is strained and unsubstantiated. They rely on the following language for the argument that Section 706 independently grants forbearance authority:

> The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) *by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.*[4]

Congress' reference to "regulatory forbearance" is just that – a reference. Section 706 identifies a broad goal – the encouragement of advanced telecommunications capability – and suggests possible means that the Commission may use within its authority under the Communications Act to achieve that goal. It merely *lists* regulatory methods the Commission may "utiliz[e]" to promote the articulated goal. Nothing in the language of this list can be read as a independent grant of authority, irrespective of the remainder of the Communications Act.

The Conference Report's discussion of Section 706 further illustrates the weakness of the BOC Petition's arguments. The thrust of the section, the Report makes clear, is to ensure "that advanced telecommunications capability is promptly deployed by requiring the Commission to

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[3] Bell Atlantic Petition at 6, 10; U S West Petition at 36 n.15; Ameritech Petition at 14 n.23.

initiate and complete regular inquiries to determine whether advanced telecommunications capability, particularly to schools and classrooms, is being deployed in a 'reasonable and timely fashion.'" H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. 210. The report does not state that it is granting new authority to achieve these purposes nor does it discuss the scope of the forbearance authority the BOCs contend was granted. Given that the courts had concluded prior to the 1996 Act that the FCC did not possess such authority, one would expect that if Congress were granting such new-found authority it would have said so. Instead, the Conference Report focuses on the *procedure* by which the Commission will review deployment of advanced telecommunications capabilities. It is the inquiry, not the authority, that Congress mandated in Section 706.

Indeed, if the BOCs' interpretation of Section 706 were correct, Congress created not one, but four new grants of authority under this section. Under the BOCs' interpretation, Section 706 would also provide independent authority – bounded only by the "public interest, convenience, and necessity" -- to employ "price cap regulation," "measures that promote competition in the local telecommunications market," and "other regulating methods that remove barriers to infrastructure." Under this reading, the Eighth Circuit's decision would be moot, for the Commission could require, for example, TELRIC pricing, combinations of UNEs, and pick and choose rights under its authority to adopt "measures that promote competition in the local telecommunications market." Indeed, the FCC's ability to regulate local services would be virtually unlimited, provided the FCC could make the requisite finding that such regulation is in the public interest.

(...continued)

[4] Telecommunications Act of 1996, Pub. Law No. 104-104, 110 Stat. 56, § 706(a) (1996) (continued...)

Moreover, Section 706 endows not only the FCC with such authority but also "each State commission with regulatory jurisdiction over telecommunications services." Section 706 cannot be read to have such a far reaching scope.

It would be highly unusual, to say the least, to conclude that Congress took care to articulate a new forbearance authority in Section 10 of the Act – limited by four criteria for its exercise—but at the very same time created an additional authority elsewhere in the Act to engage in the same activity bounded only by "the public interest, convenience and necessity." In a transparent attempt to avoid Section 10(d)'s clear statutory restriction upon the FCC, the BOCs frame their Petitions in terms of Section 706 forbearance. Despite the BOCs' best efforts to disguise their Petitions, the fact remains that they have filed exactly the type of petition contemplated by Section 10, both procedurally and substantively. All of the Section 706 trappings simply amount to an attempt to petition the Commission for interLATA forbearance while making an end run around Section 10(d)'s prohibition on exactly that. The BOCs cannot be allowed to avoid the prohibition on 271 forbearance simply by captioning their Petitions creatively.

Similarly, the BOCs' attempts to limit Section 10(d) are unpersuasive. The Petition claims that the phrase "under subsection (a) of this section" in Section 10(d) somehow transformed the general authority to encourage the deployment of advanced telecommunications capabilities and to conduct inquiries found in Section 706 into a specific grant of authority to the FCC to override the explicit obligations of Sections 251(c) and 271. No explanation is offered for why Congress would be so magnanimous with its forbearance authority under Section 706

(...continued)
(emphasis added).

but so protective of it under Section 10. Such a self-contradictory position is so implausible that it "should be adopted only as a last resort." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 12 FCC Rcd 8653, ¶ 40 (1997). In fact, Section 10(d)'s reference to forbearance "under subsection (a)" demonstrates that Congress presumed that if a party were to petition the Commission for any form of forbearance relief, it would do so under the section specifically designed for requesting regulatory forbearance, Section 10, and the prohibition on exercising such authority with respect to Sections 251 and 271 would apply.

III. FORBEARANCE WOULD HARM COMPETITION IN ADVANCED TELECOMMUNICATIONS SERVICES, RATHER THAN PROMOTE IT

Excel is the fifth largest interexchange carrier in the United States in terms of presubscribed lines, and is one of the fastest growing providers of telecommunications services in the nation. Through resale and increasingly through the use of its own facilities, Excel offers a full range of residential and business telephony, and it is now also pursuing the provision of competitive local exchange services. Through its wholly-owned subsidiaries, Excel currently is authorized to provide competitive local exchange service in over 30 states, and soon will be certified in all 50. Excel intends to offer a wide range of advanced telecommunications services to its customers, including packet-switched data services and Internet connectivity.

However, like all other providers trying to enter the local telephony business, Excel is hindered by the BOCs' monopoly control over essential telecommunications services and facilities. Section 251(c) grants Excel significant rights to overcome this barrier, by allowing it to interconnect at any technically feasible point and to purchase unbundled network elements for the provision of any telecommunications service. Elimination of those rights in the context of

"data" services would be devastating to Excel and to competition in local services.

Over the past decade, the BOC Petitioners– like most other ILECs – have been transforming their networks, replacing old, analog facilities with digital facilities for aggregating, transmitting and routing telecommunications traffic. During this time, they have completely rebuilt their interoffice networks, replacing virtually all of the coaxial copper cable used for interoffice transport with fiber optic cable. These fiber optic facilities are capable of transporting any kind of digital signal, whether it is circuit switched or packet switched, narrowband, wideband or broadband. In fact, the use to which optical fiber cable is put is determined entirely by the electronic equipment that originates and terminates the transmission over the facility. It is therefore technically impossible to segregate interoffice transport facilities according to the network characteristics defined in the Petitions. As a result, any exemption for "data" services will be impossible to control and would grant the BOCs virtual carte blanche to avoid their Section 251 obligations for interoffice facilities simply by turning on and off the electronics in their networks.

A similar transformation is occurring in the local loop. The BOCs increasingly are deploying new technologies in the loop, including Digital Loop Carrier ("DLC") and Digital Subscriber Line ("DSL"). These loop technologies place high capacity fiber or coaxial cable in portions of the loop, and condition the remaining twisted pair wire to handle high capacity transmissions. As with interoffice transport facilities, these technologies allow local loop facilities to be used for circuit switched or packet switched, narrowband, wideband or broadband applications. The local loop remains an essential facility, however, even if the BOC conditions it for higher capacity transmissions.

Any regulatory scheme that attempted to adopt such a distinction would have two consequences. First, the BOCs would have every incentive to convert the most attractive customers to "advanced" services immune from Section 251, while leaving undesirable customers to languish on an outdated and crumbling POTS system. Second, the proposal would grant to the BOCs, and the BOCs alone, the ability to serve the telecommunications "haves" through these technologies. Upon conditioning a loop or replacing old network technologies, the BOCs would be able to exempt some or all of their ubiquitous network from access by others. New entrants such as Excel would be shut out of the market completely by such actions.

Interestingly, the Petitions concentrate the majority of their arguments on relief that is within a BOC's own control, and can be achieved without creating a travesty of the 1996 Act. The BOC Petitions focus great attention on the harm that the "interLATA barrier" allegedly causes, completely neglecting that the keys to this authorization were placed in their hands on the day the Telecommunications Act of 1996 became law. To break free from the interLATA restrictions the Petitions now complains of, a BOC needs to comply with Section 251, rather than be exempted from it. Rather than uphold their part of the bargain, however, the BOC Petitioners now come before the Commission, without having adequately allowed local competition, to argue that they should receive interLATA authority just because they ask. But Congress had the better idea: the BOCs may obtain the relief sought simply by taking actions that they were instructed to take over two years ago. If they do, all telecommunications users will benefit, not just those served by the BOCs.

IV. CONCLUSION

Sections 251(c) and 271 set out specific obligations and standards designed to

open the local telecommunications market to competition and to foster a multi-provider, full service telecommunications environment. Rather than fulfill that Congressional vision, the BOCs seek to create a "data" exception to competition that is unlawful, unwise and uncontrollable. The BOCs should free themselves from the interLATA barrier that they claim is hindering their participation by interconnecting with others, unbundling their network elements, and by providing for resale of their retail telecommunications services. That is the path chosen by the 1996 Act, that is the path the FCC must follow, and that is the best path to encourage the deployment of advanced telecommunications services to all Americans, as Section 706 states.

Respectfully submitted,

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April 6, 1998

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